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No. 89-1735

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN POZSGAI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for discharging pollutants onto a federally protected wetlands site without a permit, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A).

2. Whether the Sentencing Commission exceeded its authority in promulgating Sentencing Guidelines § 2Q1.3, as applied to the offense of discharging pollutants onto a wetlands site without a permit.

3. Whether the imposition of a $200,000 fine for convictions on 40 counts of discharging pollutants onto a wetlands site without a permit violated the Excessive Fines Clause of the Eighth Amendment.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 897 F.2d 524 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1990. A petition for rehearing was denied on February 8, 1990. Pet. App. 15a-16a. The petition for a writ of certiorari was filed on May 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was con-

victed on 40 counts of discharging pollutants onto a wetlands site without a permit, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A). He was sentenced to a total of three years' imprisonment, a five-year term of probation, a one-year term of supervised release, and a $200,000 fine. The court of appeals affirmed.

1. Under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, "any discharge of dredged or fill materials into 'navigable waters'—defined as the 'waters of the United States'—is forbidden unless authorized by a permit issued by the [Army] Corps of Engineers pursuant to § 404, 33 U.S.C. § 1344." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). The term "waters of the United States" is defined in regulations promulgated under the Act to include

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce * * *;
>
> * * * * *
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
>
> * * * * *
>
> (7) Wetlands adjacent to waters * * * identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. 328.3(a). In *United States* v. *Riverside Bayview Homes, Inc., supra*, this Court upheld an earlier version of the regulations at issue in this case. The Court held it is "reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." 474 U.S. at 133.[1]

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[1] The regulations define "wetlands" as

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wet-

Section 309 of the Clean Water Act, 33 U.S.C. 1319, establishes criminal sanctions for violations of the Act, and Section 309(c)(2), 33 U.S.C. 1319(c)(2), provides that any person found guilty of a knowing violation of the statute "shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both."

2. The evidence at trial showed that petitioner owned and operated a truck repair business in Morrisville, Pennsylvania. In the fall of 1986, petitioner decided to buy an adjoining 14-acre tract in order to expand his business. That tract was bordered by Bridge Street on the north, U.S. Route 1—a four-lane highway—on the south, a salvage yard on the west, and a tire dealership and apartment complex on the east. See Pet. 3; Pet. App. 42a (Gov't Exh. 1). A stream ran through the tract, flowing down through the property from the northeast and exiting through a culvert at the southern border. The culvert passed underneath Route 1. The Pennsylvania Canal, which ran roughly parallel to Route 1, was located nearby to the south. See Pet. 3; Pet. App. 42a (Gov't Exh. 1); Gov't C.A. Br. 6; 1 Dec. 27, 1988, Tr. 86; 1 Dec. 28, 1988, Tr. 29-30, 41; 2 Dec. 28, 1988, Tr. 77, 91; Dec. 29, 1988, Tr. 30-31, 34-35, 51-52, 145; Gov't Exhs. 9, 20; Def't Exh. 14.

While petitioner was negotiating to purchase the tract, he learned from environmental and engineering consultants that the tract met the criteria established by the Corps of Engineers for protected "wetlands" and thus that "any future development that might be considered on this site would have to be approved and reviewed by the Army Corps of Engineers." 1 Dec. 27, 1988, Tr. 73; see *id.* at

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lands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. 328.3(b).

91-92; Gov't Exhs. 2, 3. Shortly after he began the process of purchasing the tract, however, petitioner began depositing fill material onto the tract without obtaining approval from the Corps of Engineers. In April 1987, a Corps of Engineers inspector visited petitioner at the site. The inspector's on-site investigation confirmed that the tract contained wetlands protected under federal law. As a result, the inspector warned petitioner that federal law prohibited him from continuing to deposit fill onto the land without first obtaining the necessary permits and authorization. Gov't C.A. Br. 6-7; 2 Dec. 27, 1988, Tr. 4-18.

Despite repeated warnings, petitioner continued to have truckloads of fill material—mainly construction and excavation debris—dumped onto the site. In September 1987, the Corps of Engineers notified petitioner by letter that his unauthorized filling was in violation of the Clean Water Act and directed him "to cease and desist from conducting, contracting or permitting any further filling of the wetlands or areas subject to federal jurisdiction." 2 Dec. 27, 1988, Tr. 23; Gov't Exh. 4. Petitioner ignored the notice and continued to deposit fill onto the site. After continued monitoring of petitioner's activities, the United States Environmental Protection Agency notified petitioner in early December 1987 that his "filling without a permit is a violation of the Clean Water Act" that could subject him to penal sanctions. 2 Dec. 28, 1988, Tr. 22; Gov't Exh. 18. After receiving that notice, petitioner continued the process of filling the site.

As a result, the Corps of Engineers issued petitioner a second notice of violation on December 17. That notice reiterated the earlier warnings and informed petitioner that

> [r]ecent inspections by [Corps of Engineers] personnel * * * have revealed that approximately five acres

> of additional unauthorized fill material has been placed in Federally regulated wetlands on [the tract]. Work of this nature, when conducted without a Department of the Army permit is a violation of Section 301 of the Clean Water Act.

2 Dec. 28, 1988, Tr. 16-17; Gov't Exh. 6. The notice again advised petitioner to stop his unlawful filling and instructed him to apply for a permit if he wished to resume his activities.

The filling process continued in spite of the warnings. On August 24, 1988, the United States Attorney filed a civil action against petitioner and obtained a temporary restraining order directing petitioner immediately to stop discharging fill material onto the wetlands site. Dec. 29, 1988, Tr. 79-81; Gov't Exh. 44. Over the next several weeks, however, truckloads of fill material continued to be dumped onto the site. Petitioner's discrete acts of unlawful filling of the site over a 14-month period constituted the 41 offenses charged in the indictment. Gov't CA. Br. 8-9.

3. At sentencing, the probation officer recommended a sentence of 21 to 27 months' imprisonment under the Sentencing Guidelines for the 25 counts that were subject to the Guidelines. The probation officer determined that petitioner's offense had a "total offense level" of 16: a base level of six, a six-level increase under Sentencing Guidelines § 2Q1.3(b)(1)(A) for continuous and ongoing discharging activities, and a four-level increase under Sentencing Guidelines § 2Q1.3(b)(4) for discharging without a permit. C.A. App. A35-A37. The probation officer also informed the district court that because 33 U.S.C. 1319(c)(2)(A) "calls for a mandatory minimum fine of $5,000 * * * per day of violation," petitioner faced "the minimum mandatory fine [of] $200,000" for the 40 counts of conviction. C.A. App. A38. The prosecutor agreed with the probation officer's recommendations under the

Guidelines and asked the court to impose a sentence of 27 months' imprisonment, and "the mandatory minimum fine in this case of $200,000.00." July 13, 1989, Tr. 63; see *id.* at 27.

Petitioner challenged the probation officer's calculation of the offense level. First, petitioner argued that a four-level increase under Sentencing Guidelines § 2Q1.3(b)(4) was unwarranted because the offense of conviction itself involved discharging without a permit, the punishment for which was already reflected in the base offense level of six. Second, petitioner contended that a six-level increase under Sentencing Guidelines § 2Q1.3(b)(1)(A) was inappropriate because the criminal conduct at issue—failure to obtain a permit for discharging fill—was not the sort of "ongoing, continuous" activity covered by that Guideline. July 13, 1989, Tr. 7-11.

The district court rejected petitioner's arguments and agreed with the probation officer's recommendations under the Sentencing Guidelines. July 13, 1989, Tr. 20-21, 25-26. Stating that "[i]t's hard to visualize a more stubborn violator of the laws that were designed to protect the environment," *id.* at 66, the court sentenced petitioner to a three-year term of imprisonment on Counts 1-14 (the pre-Guidelines counts), a concurrent term of 27 months' imprisonment on Counts 16-41 (the counts governed by the Guidelines), a five-year term of probation on Count 15, and a one-year term of supervised release on the Guidelines counts. The court also ordered petitioner to pay a fine of $5,000 on each count, for a total of $200,000, and as a condition of probation, the court ordered petitioner to comply with a restoration plan for the wetlands site. *Id.* at 67.[2]

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[2] Before the jury retired for deliberations, the government discovered that Count 33 and Count 34 were duplicative and therefore withdrew the latter. Dec. 30, 1988, Tr. 89.

4. On appeal, petitioner contended that the government had not presented sufficient evidence to show that his wetlands site was a "water[ ] of the United States," 33 U.S.C. 1362(7). In particular, he claimed that the government had failed to prove that the stream on his property was a tributary of the Pennsylvania Canal and that the Canal had the required nexus with interstate commerce. Pet. C.A. Br. 8-13; Pet. C.A. Reply Br. 1-7. Petitioner also contended that the government had failed to prove that he had discharged any "pollutant" on the site, as that term is used in 33 U.S.C. 1311(a) and 1362(6). Pet. C.A. Br. 24-27; Pet. C.A. Reply Br. 7-13.

In addition to contesting his conviction, petitioner challenged his sentence on several grounds. First, he argued that the district court erroneously applied Sentencing Guidelines § 2Q1.3(b)(1)(A) and (b)(4) to increase his offense level to 16; alternatively, he contended that if that application of the Guidelines was correct, those Guidelines were illegal. Pet. C.A. Br. 27-38; Pet. C.A. Reply Br. 16-20. Second, petitioner contended that the district court abused its discretion in imposing a term of three years' imprisonment and a substantial fine on the pre-Guidelines counts. Pet. C.A. Br. 38-41; Pet. C.A. Reply Br. 21. Third, petitioner argued that the court's sentence was so grossly disproportionate to his offense that it violated the Eighth Amendment. Pet. C.A. Br. 41-44; Pet. C.A. Reply Br. 21-25.[3]

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[3] Petitioner also claimed that he was authorized to fill his wetlands site by virtue of a "nationwide permit" issued by the Corps of Engineers under 33 U.S.C. 1344(e), Pet. C.A. Br. 13-23; Pet. C.A. Reply Br. 13-15, and that his trial counsel had rendered ineffective assistance, Pet. C.A. Br. 23-24. The court of appeals rejected those claims, Pet. App. 2a-3a, and petitioner has not sought further review of those aspects of the court of appeals' judgment.

The court of appeals summarily rejected each of petitioner's claims in an unpublished judgment order. Pet. App. 1a-3a.

ARGUMENT

1. Petitioner's principal contention (Pet. 10-21) is that the government did not present sufficient evidence to support his convictions for discharging pollutants onto a federally protected wetlands site without a permit, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A).

a. First, petitioner claims (Pet. 10-17) that the government failed to prove that his wetlands site was a "water[ ] of the United States," 33 U.S.C. 1362(7). Therefore, he contends, he was not required to obtain a permit to discharge the fill materials he placed on the property.

The indictment alleged that petitioner's property was a federally protected wetlands under the Clean Water Act and its implementing regulations because the site was adjacent to a tributary of the Pennsylvania Canal. That Canal, the indictment alleged, was a "water of the United States" under the applicable regulations, which define "waters of the United States" as waters "which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." C.A. App. A26. See 33 C.F.R. 328.3(a)(1), (5), and (7).

It is true that the government did not offer direct evidence that the stream on petitioner's property flowed into the Pennsylvania Canal, or that the Canal had been used in interstate commerce.[4] There was, however, evidence from which the jury could have inferred both facts. With respect to the stream's status as a "tributary" under

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[4] The prosecutor advised the jury in his opening statement that he would be offering direct evidence to establish both of those facts, but apparently because of an oversight that evidence was never introduced.

33 C.F.R. 328.3(a)(5), testimony and documentary evidence showed that the stream flowed through petitioner's tract toward the Pennsylvania Canal, which was located near the tract's southern border on the other side of Route 1—a fact pointed out by one of the government's expert witnesses. See 1 Dec. 28, 1988, Tr. 41; Pet. App. 42a (Gov't Exh. 1); Gov't Exh. 9. The stream entered petitioner's site from the northeast and exited through a culvert at the southern border that ran underneath Route 1.[5] From that evidence, the jury could reasonably infer that the stream flowed through the culvert and into the Canal just south of Route 1.[6]

With respect to the status of the Pennsylvania Canal as a waterway that was "used in the past, or may be susceptible to use in interstate or foreign commerce," 33 C.F.R. 328.3(a)(1), the photographic evidence introduced at trial showed that the Canal was a substantial waterway that obviously could have handled shipping traffic at one time. See Pet. App. 42a (Gov't Exh. 1); Pet. App. 41a; Gov't Exhs. 7, 9.[7] Consequently, the jury could reasonably infer that the Canal was "susceptible to use in interstate * * * commerce."

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[5] See Pet. 3; Pet. App. 42a (Gov't Exh. 1); Gov't C.A. Br. 6; 1 Dec. 27, 1988, Tr. 86; 1 Dec. 28, 1988, Tr. 29-30, 41; 2 Dec. 28, 1988, Tr. 91; Dec. 29, 1988, Tr. 30-31, 34-35, 51-52, 95, 145.

[6] The government's brief in the court of appeals asserted that the aerial photographs introduced at trial showed the stream flowing into the Canal. That representation, we have now determined, was inaccurate. We have examined the photographs and determined that they do not show the stream flowing into the Canal. However, the photographs would not be expected to show the intersection of the stream and Canal, since the evidence showed that the stream went underground through a 72" culvert shortly before it left petitioner's property. 2 Dec. 28, 1988, Tr. 91; Dec. 29, 1988, Tr. 95; Gov't Exh. 20.

[7] Although it was not necessary for the jury to find that the Canal had actually been used in interstate commerce, the evidence would

As a matter of historical fact, the Pennsylvania Canal was used in interstate commerce for nearly a century. The Canal, which runs for approximately 60 miles along the Delaware River, the border between Pennsylvania and New Jersey, was a shipping route between the Pennsylvania Lehigh Valley and markets in eastern Pennsylvania and southern New Jersey. The Canal opened in 1832 and was closed to active traffic in 1931. See, *e.g.*, R. McCullough & W. Leuba, *The Pennsylvania Main Line Canal* 80-82, 166-167 (1962); see generally C.P. Yoder, *Delaware Canal Journal* (1972). The Canal was designated as a National Historic Landmark in 1976. United States Army Corps of Engineers, *Preliminary Case Report for Neshaminy Water Resources Authority, Point Pleasant Diversion Project, Point Pleasant, Bucks County, Pennsylvania* § 2.1, at 7 (Mar. 19, 1982).

The Canal's status as an interstate waterway is the kind of fact that is capable of judicial notice under Federal Rule of Evidence 201, since it is "not subject to reasonable dispute in that it is * * * capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The court of appeals could properly take judicial notice of the Canal's use in interstate commerce, even though the district court did not do so. See *Government of the Canal Zone* v. *Burjan*, 596 F.2d 690, 693-694 (5th Cir. 1979); *United States* v. *Blunt*, 558 F.2d 1245, 1247 (6th Cir. 1977). For that reason as well, petitioner's jurisdictional claim fails.

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have supported such a conclusion. The photographic evidence showed that the Canal ran toward the New Jersey border, since it was established that petitioner's tract was located in Morrisville, Pennsylvania, directly across from Trenton, New Jersey. See, *e.g.*, Pet. 3; Pet. App. 42a (Gov't Exh. 1).

Apart from the evidence regarding the status of the stream as a tributary of the Canal and the use of the Canal in interstate commerce, there was direct evidence from several expert witnesses establishing that petitioner's wetlands property was federally protected and subject to Army Corps of Engineers jurisdiction under the Clean Water Act. See 1 Dec. 27, 1988, Tr. 47; 1 Dec. 28, 1988, Tr. 17-18, 44-46; see also Gov't Exhs. 4, 6, 18; 2 Dec. 28, 1988, Tr. 21-22. That evidence provided an independent basis from which the jury could have inferred that the requirements of federal jurisdiction were met. To be sure, the witnesses merely stated their conclusions that petitioner's site was subject to Army Corps of Engineers regulation; they did not explain the steps by which they had reached that conclusion. Yet, petitioner did not cross-examine the expert witnesses on that point, nor did he object to that aspect of their testimony for lack of foundation. In fact, he did not contest the presence of federal jurisdiction over the site except to argue that it did not contain "wetlands" as that term was used in the pertinent regulations. Accordingly, the jury could properly rely on the expert witnesses' conclusions that the jurisdictional requirements of the statute and the regulations were satisfied in this case.[8]

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[8] In context, the witnesses' testimony that petitioner's wetlands site was federally protected and within the jurisdiction of the Army Corps of Engineers necessarily meant that the wetlands were adjacent to a water of the United States or a tributary of such a water. 33 C.F.R. 328.3(a)(1), (5), and (7). There are only two other ways that wetlands can be within federal jurisdiction: either by being "interstate wetlands," 33 C.F.R. 328.3(a)(2), or by having a use or potential use that affects interstate commerce, 33 C.F.R. 328.3(a)(3). The photographic evidence conclusively established that petitioner's site was not an "interstate" wetlands, since it was located entirely within the Commonwealth of Pennsylvania, and the evidence regarding federal jurisdiction could not have rested on any effect on interstate com-

In sum, the record is admittedly quite thin with regard to the two elements needed to establish federal jurisdiction over the wetlands site—the physical connection between the stream and the Pennsylvania Canal, and the historical status of the Canal as a waterway used or susceptible to use in interstate commerce. Nevertheless, in our view, the record contains sufficient evidence on those issues, particularly in light of the fact that petitioner has not at any point suggested that the presence of those jurisdictional facts could have been contested.

b. Petitioner also claims (Pet. 18-21) that the government did not prove that he had discharged "pollutants" within the meaning of 33 U.S.C. 1344(a) and 1362(6), because the evidence did not show that he discharged any material into "water." The Clean Water Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source * * *." Section 502(12), 33 U.S.C. 1362(12). The Act defines "pollutant" to include "rock, sand, [and] cellar dirt." Section 502(6), 33 U.S.C. 1362(6).

As shown above, petitioner's wetlands site constituted "navigable waters" within the meaning of the Clean Water Act, and petitioner does not dispute that he was responsible for discharging material onto the site from a "point source," *i.e.*, dump trucks. See, *e.g.*, *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 922 (5th Cir. 1983). Contrary to petitioner's submission, the fill materials he used on his wetlands site—construction and excavation debris—plainly qualify as "pollutants" under the terms of the statute. See *United States* v. *Riverside*

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merce, because the witnesses who identified petitioner's property as federally protected wetlands were testifying about its physical and geographical properties, not about the use to which it was being or could be put.

Bayview Homes, Inc., 474 U.S. at 123.[9] Moreover, the record shows that petitioner repeatedly discharged those materials onto his wetlands site, namely, an "area[ ] * * * inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do[es] support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 328.3(b). See Gov't C.A. Br. 6-16. There is thus ample evidence that petitioner discharged "pollutant[s]" into "water," as those terms are used in the Clean Water Act.

2. Petitioner also contends (Pet. 21-29) that the Sentencing Commission exceeded its authority in promulgating Sentencing Guidelines § 2Q1.3, as applied to the offense of discharging pollutants onto a wetlands site without a permit. In petitioner's view, that Guideline automatically causes "double counting" (Pet. 23) of the same criminal conduct—discharging fill without a permit—that results in sentences far exceeding those previously imposed for environmental offenses.

The Sentencing Commission recognized that in light of their variety, regulatory offenses called for a particular approach under the Guidelines. As the Commission explained:

> (1) The [typical] guideline provides a low base offense level (6) aimed at * * * [a] recordkeeping or

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[9] See also *In re Alameda County Assessor's Parcel Nos. 537-801-2-4 and 537-850-9*, 672 F. Supp. 1278, 1284-1285 (N.D. Cal. 1987); *United States* v. *Larkins*, 657 F. Supp. 76, 78-79 n.2 (W.D. Ky. 1987), aff'd, 852 F.2d 189 (6th Cir. 1988), cert. denied, 109 S. Ct. 1131 (1989); *United States* v. *Tull*, 615 F. Supp. 610 (E.D. Va. 1983), aff'd, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Lambert*, 589 F. Supp. 366, 371 (M.D. Fla. 1984); *United States* v. *Robinson*, 570 F. Supp. 1157, 1162-1163 (M.D. Fla. 1983); *United States* v. *Bradshaw*, 541 F. Supp. 880, 882-883 (D. Md. 1981); *United States* v. *Weisman*, 489 F. Supp. 1331, 1336-1337 (M.D. Fla.), aff'd, 632 F.2d 891 (5th Cir. 1980) (Table).

> reporting offense. It gives the court the legal authority to impose a punishment ranging from probation up to six months of imprisonment.

Sentencing Guidelines ch. 1, Pt. A, para. 4(f), at 1.10. Such "recordkeeping or reporting offense[s]" merited a low base offense level because they typically involved "more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information." *Ibid.*[10] Beyond those sorts of technical offenses, the Sentencing Commission prescribed (*ibid.*)

> [s]pecific offense characteristics designed to reflect substantive offenses that do occur (in respect to some regulatory offenses), or that are likely to occur, [in order to] increase the offense level.

And the Commission explained (*ibid.*) that

> [a] specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

Under the Sentencing Guidelines, the relatively low base offense level therefore prescribes punishment only for technical regulatory violations that do not otherwise involve substantive conduct subject to regulation. The Guidelines take the defendant's substantive conduct into account through specific offense characteristics. In this case, contrary to petitioner's submission, petitioner was

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[10] The Commission also recognized that

> in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper treatment of any toxic substance. * * *

Sentencing Guidelines ch. 1, Pt. A, para. 4(f), at 1.10.

not convicted of slipshod recordkeeping or simply failing to obtain a necessary form. Rather, his offenses involved a continuous course of conduct of discharging pollutants onto a federally protected wetlands site without obtaining authorization from the Corps of Engineers. The Guidelines properly treated petitioner's conduct for what it was, *i.e.*, "ongoing, continuous, [and] repetitive discharge * * * of a pollutant into the environment," Sentencing Guidelines § 2Q1.3(b)(1)(A), and "discharge [of a pollutant] without a permit," Sentencing Guidelines § 2Q1.3(b)(4).

The Sentencing Commission acted well within its statutory mandate in promulgating the Guidelines that apply to environmental offenses, such as discharging pollutants onto wetlands. Congress specifically instructed the Commission to

> insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. * * *

28 U.S.C. 994(m). Congress further directed that the Commission "shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code." 28 U.S.C. 994(m).

Consequently, the Commission sought and received information from the Environmental Protection Agency

regarding past criminal prosecutions and sentencing for environmental offenses.[11] The EPA, for example, told the Commission that more stringent sentences were needed for environmental offenses and that Congress was considering making certain environmental crimes felonies, as opposed to misdemeanors. In February 1987, Congress raised the criminal penalties for intentional violations of provisions of the Clean Water Act, including discharging pollutants onto wetlands. See Water Quality Act of 1987, Pub. L. No. 100-4, Tit. III, § 312, 101 Stat. 42-43 (codified at 33 U.S.C. 1319(c)(2)). Instead of being punishable as misdemeanors, those offenses were made felonies punishable by a maximum term of three years' imprisonment.

The Commission's guidelines for environmental offenses, which became effective on November 1, 1987, properly reflected past sentencing practices and Congress's recent legislation. As the Commission explained:

> The Commission has not simply copied estimates of existing practice as revealed by the data (even though establishing offense values on this basis would help eliminate disparity, for the data represent averages). Rather, it has departed from the data at different points for various important reasons. Congressional statutes, for example, may suggest or require departure, as in the case of the new drug law that imposes increased and mandatory minimum sentences. In addition, the data may reveal inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Sentencing Guidelines ch. 1, Pt. A, para. 3, at 1.4. Accordingly, the Commission did not act improperly in

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[11] Petitioner is mistaken in suggesting (Pet. 25) that the Sentencing Commission promulgated guidelines for environmental offenses without first considering past practices.

promulgating the Sentencing Guidelines that apply to environmental offenses, such as Sentencing Guidelines § 2Q1.3(b)(1)(A) and (b)(4).

4. Finally, petitioner contends (Pet. 29-30) that the district court's imposition of a total fine of $200,000 violated the Excessive Fines Clause of the Eighth Amendment. As petitioner correctly observes, "[t]his Court has never issued a decision on the Excessive Fines Clause." Pet. 29. This case is not an appropriate vehicle for addressing the scope of that constitutional provision for two reasons. First, the fine imposed on each count was at the bottom of the range prescribed by Congress. Under Section 309(c)(2) of the Clean Water Act, 33 U.S.C. 1319(c)(2), any person found guilty of an offense "shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both." Petitioner stood convicted of 40 separate violations, and thus faced a fine of up to $2,000,000. Cf. *United States* v. *Elkins*, 885 F.2d 775, 789 (11th Cir. 1989), cert. denied, 110 S. Ct. 1300 (1990). It is unlikely that Congress's judgment as to the appropriate range for fines is so badly flawed that a fine at the bottom of the prescribed range, which is only 10 percent of the statutory maximum, could be found to be constitutionally excessive.

Second, although petitioner has not raised the point here or in the courts below, the probation officer incorrectly asserted that a mandatory minimum fine was applicable. That assertion, together with the prosecutor's comments at sentencing, see July 13, 1989, Tr. 63, may have led the district court to believe that it was required to impose at least a $200,000 fine. See *id.* at 26-27 ("If I understand it correctly, then, so far as the applicable guidelines, it's * * * a fine of $200,000 to $2 million * * *."). If the court believed it was required to impose such a fine, it was mistaken.

The applicable penalty provision, 33 U.S.C. 1319(c)(2)(A), does not mandate the imposition of a fine on any single count if the court imposes a term of imprisonment on that count; the statute requires the court to impose a fine of at least $5,000 only if the court elects to impose some fine, either in place of, or in addition to, imprisonment. The Sentencing Guidelines required the imposition of some fine, subject to the court's consideration of petitioner's financial condition. Sentencing Guidelines § 5E4.2(a), (c)(1)(A), (c)(3), and (f) (1987 and 1988). Again, however, neither the statute nor the Sentencing Guidelines required a cumulative fine of at least $5,000 on each count. Assuming the district court found that petitioner was financially capable of paying some fine, it could have satisfied the requirements of both the statute and the Sentencing Guidelines by imposing a $5,000 fine on one count and not imposing any fine on any of the other counts. Instead, the district court imposed a $5,000 fine on each of the 40 counts of conviction, even though the probation officer informed the court that such a fine will "completely devastate [petitioner's] financial future, given his age and earning ability." C.A. App. A40.

Because the district court may have sentenced petitioner on the basis of the misapprehension that the court did not have the authority to impose a lesser fine, the $200,000 fine may not represent the district court's judgment as to the appropriate fine that should be imposed in this case. Under these circumstances, petitioner may challenge the fine through a collateral attack on the judgment in the district court. If the district court concludes that it imposed the original fine because of a misapprehension about its authority under the statute and the Sentencing Guidelines, the court may decide to impose a lesser fine, or no fine at all, in which case petitioner's argument under the Excessive Fines Clause will be moot. For that reason, the issue

of the amount of the fine, in light of the proper interpretation of the statute and the Sentencing Guidelines, should be raised in, and addressed by, the district court in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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